CANADIAN HUMAN RIGHTS TRIBUNAL

ANNUAL REPORT 2009

Ensuring equal access to the opportunities of Canadian society through efficient, fair and equitable adjudication

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Canadian Human Rights Tribunal/Annual Report 2009

Message from the Chairperson

Canadians are proud of their progress toward building a diverse society, where the ideals of equality and inclusion have become increasingly respected. However, achieving true equality remains an ongoing challenge. The Canadian Human Rights Tribunal is an integral part of the infrastructure created by the federal government to reach that goal.

The Tribunal is the administrative body that hears complaints of discrimination that arise in areas under the legislative authority of the Government of Canada. These include federal government departments and agencies and Crown corporations, as well as banks, airlines and other federally regulated employers and providers of goods, services, facilities and accommodation.

The Tribunal hears from complainants and respondents alike, as well as from interested third parties, including the Canadian Human Rights Commission. Through open, fair and transparent hearings, the Tribunal assesses evidence and rules on complaints of discrimination. The Tribunal's decisions inform the parties — and Canadians — about the law as it applies to specific facts that arise in complaints. By guaranteeing open, fair and transparent hearings, and by providing just and well-reasoned rulings on individual complaints of discrimination, the Tribunal helps to entrench equality into the daily lives of Canadians. Through practical and legally binding decisions, the Tribunal gives effect to the lofty ideals of equality and fairness.

This annual report chronicles the Tribunal's activities in 2009, mostly during the tenure of former Chairperson J. Grant Sinclair. As the newly appointed Chairperson, effective November 2, 2009, I have taken up the search for new and innovative ways to enhance the effectiveness and efficiency of the Tribunal's inquiry process. For example, a number of cases have already benefited from a more interventionist approach to case management, resulting in shorter hearings. This approach is allowing the parties to access justice in a more timely and cost effective fashion. An increase in settlements results in direct savings of legal costs to parties, as do shorter hearings. This is particularly important given the recent decision in *Mowat v. Canada (Canadian Forces)* 2009 FCA 309 where the Court of Appeal ruled that compensation for legal expenses cannot be ordered by the Tribunal.

In 2010-2011, we will continue our efforts to provide the highest quality service and best possible value to the Canadian public. As the new Chair, I will explore other innovative ways to provide an effective and efficient process, one that gives parties timely access to justice and brings Canada closer to the truly diverse, equal, and fair society our citizens deserve.

Shirish P. Chotalia, Q.C., LL.M.

Who We Are and What We Do

The Canadian Human Rights Tribunal (CHRT) is responsible for applying the principles of the *Canadian Human Rights Act*, which is designed to protect individuals from discrimination. The *Act* states that all Canadians have the right to equality, equal opportunity, fair treatment, and an environment free of discrimination. The *Act* prohibits discrimination on the basis of race, national or ethnic origin, colour, religion, age, sex (including pregnancy), marital status, family status, sexual orientation, disability (including drug dependency) or pardoned criminal conviction. Maintaining wage differences between male and female workers performing work of equal value in the same establishment is also prohibited by the *Act*.

Tribunal performance reports

http://chrt-tcdp.gc.ca/NS/reports-rapports/perf-rend-eng.asp

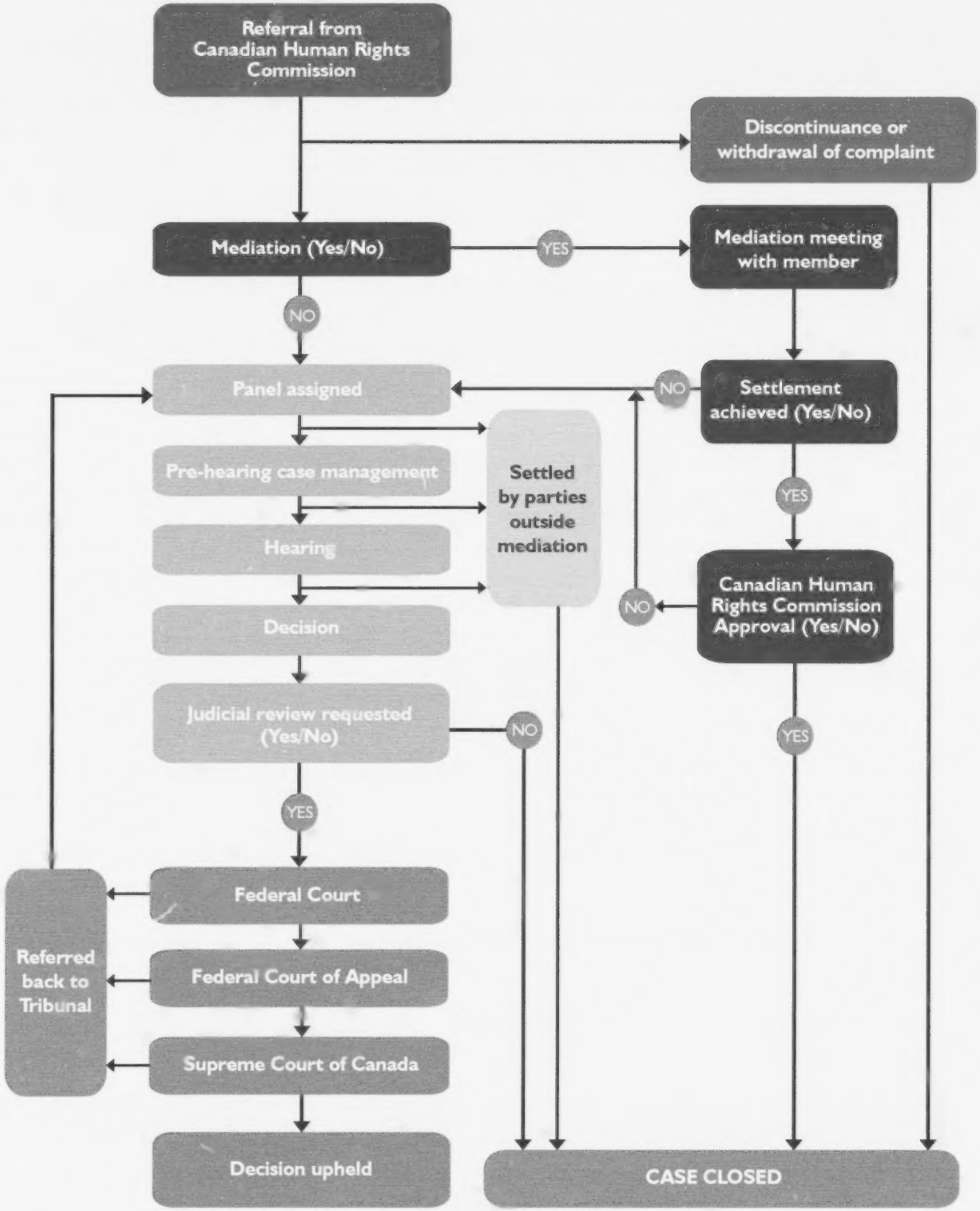
The *Act* applies only to federally regulated employers and service providers, such as federal government departments and agencies, federal Crown corporations, chartered banks, airlines, shipping and inter-provincial trucking companies, and telecommunications and broadcasting organizations. The *Act* also prohibits telecommunications and Internet messages that are likely to expose people to hatred or contempt because of their race, ethnic origin, sexual orientation or other prohibited grounds of discrimination.

The Tribunal, a quasi-judicial body, hears complaints of discrimination referred to it by the Canadian Human Rights Commission, and decides whether the given activity is a discriminatory practice that violates the *Act*. The Tribunal also has the authority to hear complaints under the *Employment Equity Act*, which applies to federal government employees and to federally regulated private sector employers with more than 100 employees.

The Tribunal is similar to a court of law; but it is less formal and hears only cases related to discrimination. Like a court, the Tribunal is strictly impartial. Unlike a court, the Tribunal provides an informal setting where the parties can present their cases without legal representation and without adhering to strict rules of evidence. Parties call witnesses or testify on their own behalf, and witnesses are subject to cross-examination. Documentary evidence is permitted. Final arguments are made at the end of the hearing. The Tribunal consists of human rights adjudicators and mediators with a great wealth of experience in these roles. If the complainant and respondent are willing, a Tribunal member may be assigned to help them achieve a mediated settlement. If mediation is refused or fails to produce a settlement, a Tribunal member will hear the complaint and render a written decision. The parties may elect to settle the complaint at any time before the Tribunal renders its decision. Tribunal decisions are subject to review by the Federal Court at the request of any of the parties.

Administrative responsibility for the Tribunal rests with a Registry that plans and arranges hearings, and acts as a liaison between the parties and Tribunal members. The Registry is also responsible for managing the operating resources allocated to the Tribunal by Parliament. Details of Registry activities, including recent developments in comptrollership, management accountability and public administration, can be found in the Tribunal's performance reports.

Figure 1: How the Tribunal Works

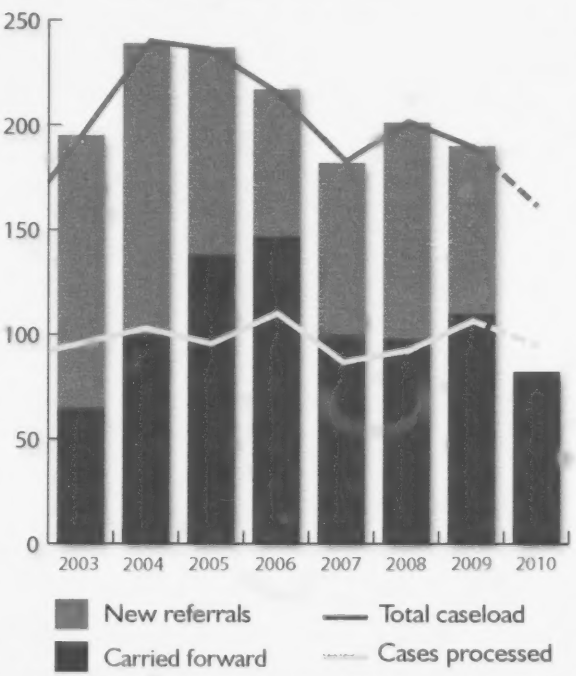


The Year in Review

In 2009, the Canadian Human Rights Commission referred 80 new complaints to the Tribunal for inquiry. Since the Tribunal carried 110 active case files forward from earlier years, its total caseload in 2009 was significant, 190 cases in all. This number was down slightly from the previous six-year average of 211 cases, or about 10 percent less than 2008.

In 2009, Tribunal members conducted 70 mediations, presided over hearings into 17 complaints, and issued 11 decisions and 23 rulings on motions, objections or other preliminary matters. At the end of 2009, 82 cases remained active, including 37 from earlier years.

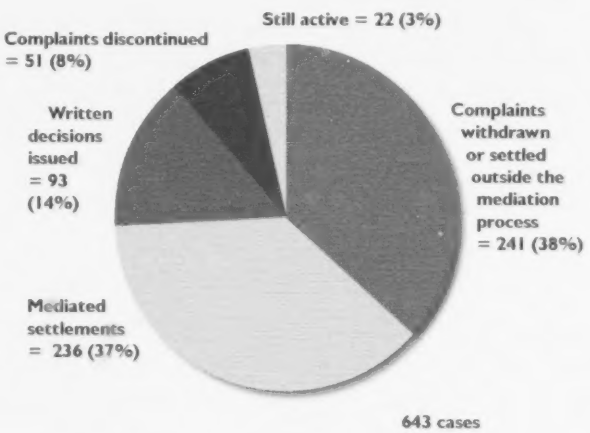
Figure 2: Tribunal case files opened and carried forward, 2003 to 2010.



*** Number of cases processed for 2010 is an estimate based on information received from the Canadian Human Rights Commission and on the mean of the previous years.**

Although annual complaint referrals peaked at 139 in 2004, this spike has continued to influence the Tribunal's caseload (see Figure 2). For example, new referrals dropped by close to 50 percent between 2004 and 2006, but the Tribunal's 2006 caseload declined by less than 10 percent compared with 2004.

Figure 3. Status of cases referred from 2003 to 2009, inclusive, as of December 31, 2009.


Still active = 22 (3%)
Complaints discontinued = 51 (8%)
Written decisions issued = 93 (14%)
Complaints withdrawn or settled outside the mediation process = 241 (38%)
Mediated settlements = 236 (37%)
643 cases

Thanks to various process improvements carried out by the Tribunal in recent years, and a return to a more typical volume of new referrals between 2004 and 2009, the Tribunal resolved all pre-2007 cases by the end of 2009, as well as more than 80 percent of cases referred in 2008 and 2009.

Mediations

In 2003, the Tribunal reinstated the mediation process, which has subsequently contributed greatly to settling complaints. Mediation sessions are easy to arrange, usually take only one day to complete, and result in settlements about 70 percent of the time. Although parties opt for mediation in only about 40 percent of cases, the revival of mediation has served to optimize the use of the Tribunal's limited resources, as well those of the parties.

One of the greatest advantages of mediations is that they typically exact a harmonious outcome. Mediations give the parties an opportunity to actively participate in the resolution of their dispute, and to fashion a creative remedy that is satisfactory to both sides. Mediation allows the parties to collaborate on a solution, an option not available in cases requiring a written Tribunal decision. Often the parties will agree that the mediated settlement should incorporate measurable targets and performance criteria designed to prevent a recurrence of the discrimination. Such a settlement may extend beyond the parties in the case, benefiting a wide constituency of employees or clients.

Tribunal Decisions

The bulk of the Tribunal's work involves conducting hearings and rendering decisions. The full text of all decisions is available on the Tribunal's website. In 2009, the Tribunal issued 11 written decisions substantiating or dismissing complaints. The Tribunal heard cases on a broad range of issues, including cases involving discrimination on the Internet, travel policies considered discriminatory toward the disabled, and age discrimination in the workplace. As well, the Tribunal rendered a decision on a case of alleged discrimination toward Aboriginal people, one of four cases the Tribunal heard that directly affected Canada's Aboriginal people.

Dreaver v. Pankiw

Some Tribunal decisions require interpretations of various parts of the *Canadian Human Rights Act*. These cases can help Canadians to better understand the intent of the *Act* and how it applies to their lives. A good example is *Dreaver v. Pankiw*, which was also one of four cases the Tribunal heard impacting on the lives of Aboriginal people. In this case, the complainants alleged that brochures (called householders) distributed by their federal Member of Parliament were racially discriminatory toward Aboriginal persons. The complainants argued that the content of the householders contravened a section of the *Act* that makes it a discriminatory practice to publish or display a "representation." Under the *Act*, a representation is a discriminatory notice, sign, symbol, or emblem. The Tribunal also needed to determine whether the householders constituted a "service" within the definition of the *Act*. The *Act* specifies that it is discriminatory to adversely differentiate between individuals in the course of providing a good, service, facility or accommodation that would be typically available to the public.

The Tribunal decided that the householders neither constituted a representation nor a service. To encompass householders, the definition of "representation" in the *Act* would need to include words like statement, article, or publication. The householders did not constitute a service, because the prime beneficiary was not the recipient, but rather the sender. The Tribunal found that the brochures were politically partisan documents designed to influence voter behaviour in the democratic process, to the benefit of the respondent. Even if the householders were deemed a service, they still weren't subject to the *Act* because it was the distribution of the householder that most clearly defined the respondent's relationship with the public, and no discrimination was evident in how the householder was distributed.

The complaint was dismissed, but has been appealed to the Federal Court. These interpretations of the *Act* have given Canadians valuable indicators on the extent to which the *Act* applies to discriminatory "representations." Similarly, Canadians will benefit from the refinements offered by the Tribunal in its interpretation of the term "services" customarily available to the general public. Such case-by-case interpretations of key statutory wording by the Tribunal make the law more definitive for Canadians, without sacrificing adaptability to as yet unforeseen future situations.

Full text of decision:
http://chrt-tcdp.gc.ca/search/files/2009_chrt_8.pdf

Roxanne Naistus v. Philip L. Chief and Onion Lake First Nation

The complainant alleged to have been the victim of sexual harassment by the respondent from 2003 to 2005. During this time, both were employees of the Onion Lake First Nation. The alleged offender did not attend the hearing. The First Nation countered that it exercised all due diligence to prevent such discriminatory acts. The Tribunal concluded that the complainant had been subject to sexual harassment, a discriminatory practice. The Tribunal found that while the First Nation did not consent to this activity, neither did it exercise all due diligence to prevent these actions. The Tribunal found that the complainant should be compensated in accordance with the *Canadian Human Rights Act*.

Full text of decision:
http://chrt-tcdp.gc.ca/search/files/t1296_2608chrt4.pdf

Warman v. Lemire et al.

The world over, the Internet has rapidly become a popular medium of the free-flowing exchange of ideas and dialogue. In 2009, the Tribunal made a significant contribution to the issues that can arise involving freedom of speech and discrimination on the Internet. In *Warman v. Lemire et al.*, the complainant alleged that the respondent was responsible for online material likely to expose individuals to hatred or contempt based on prohibited grounds of discrimination (religion, race, colour, national or ethnic origin, and sexual orientation). The respondent, who was registered as the contact for the website where the material was found, denied this allegation, and asserted that the provisions of the *Act* dealing with hate communication were unconstitutional as they violated his freedom of expression guaranteed under the *Canadian Charter of Rights and Freedoms (Charter)*.

The Tribunal dismissed the first allegation of hate communications, since the evidence did not sufficiently demonstrate that the respondent was the person responsible for uploading the material. The Tribunal also dismissed an allegation that a poem criticizing immigrants that the respondent had posted on a different website constituted a hate communication within the meaning of the *Act* since the poem did not display the extremely denigrating tone or ugly racial and ethnic epithets found in other cases where hate communication had been proven.

The Tribunal also examined an allegation directed at messages posted on the respondent's own website message board (a multi-party online discussion forum). Many of the impugned messages were posted by individuals other than the respondent. Taking into account the number of messages posted on the site by various individuals, and the dates of the impugned messages, the Tribunal concluded

that it could not infer from the evidence that the respondent was aware of the existence of these messages. Moreover, in the Tribunal's view the hate message provision of the *Act* did not extend to cases where an individual may have incited others to communicate hate messages.

The Tribunal examined several messages that had clearly been posted on the message board by the respondent, but dismissed the allegation that these messages constituted hate communication. The Tribunal then ruled on the respondent's constitutional arguments, and in particular the assertion that the hate message provisions of the *Act* constituted an unjustifiable infringement of the respondent's freedom of expression as guaranteed by the *Charter*. The Tribunal concluded that restrictions on expression in the *Act* were indeed inconsistent with the *Charter*, which guarantees freedom of thought, belief, opinion, and expression. The Tribunal therefore refused to apply these provisions of the *Act* to the case, and did not issue a remedial order. The complainant appealed the ruling to Federal Court.

Full text of decision:
http://chrt-tcdp.gc.ca/search/files/t1073_5405chrt26.pdf

Morten v. Air Canada

In 2009, the Tribunal heard a unique case concerning access to transportation services for people with disabilities. Traditionally, questions of discrimination based on disability deal with the workplace. But in *Morten v. Air Canada*, the complainant, who was deaf and had very limited vision, alleged discrimination by an airline for not letting him book a flight unless he agreed to fly with an attendant. The Tribunal concluded that the airline's policy was too rigid, as it failed to recognize differing degrees of auditory or visual impairment, and didn't allow for individual assessments of disabled passengers. In considering the appropriate form of redress, the Tribunal reviewed American regulations regarding air travel by disabled passengers, as well as a ruling by the U.S. Department of Transportation on the subject. The American authorities strongly suggested that greater accommodation could be offered by the respondent to the complainant. They also suggested that individuals with both visual and hearing impairments coped better in emergencies than was asserted by the respondent.

The Tribunal noted that the respondent would not accept the degree of risk posed by allowing the complainant to fly unaccompanied. Yet the airline tolerated the comparable or higher risk posed by some other unaccompanied passengers, such as obese individuals, persons with mobility impairments, pregnant women or individuals who require supplemental oxygen during a flight. The Tribunal's decision draws attention to the balance required between a disabled individual's legitimate interest in autonomy, including the voluntary assumption of risk, and a transportation service provider's equally legitimate interest in assuring the safety of the traveling public.

The Tribunal directed the respondent to work with the Canadian Human Rights Commission and the complainant to develop an attendant policy that accounts for the ways people with the complainant's type of disabilities communicate in an emergency. The policy would also address the inherent risk posed by passengers with compromised mobility that are currently allowed to fly unaccompanied, and would account for the fact that many able-bodied passengers are unable to receive, process and act on safety-related emergency instructions. The airline has appealed the case to the Federal Court.

Full text of decision:
http://chrt-tcdp.gc.ca/search/files/t1207_1907chrt3.pdf

Gilmar v. Alexis Nakato Sioux Nation Board of Education

The complainant alleged that the band had discriminated against her by shortening her agreed-upon employment contract after learning she was pregnant. The Tribunal found that the complainant had made a case of discrimination according to the *Act*. The Tribunal found that the Board was neither aware of nor amenable to its obligations as an employer under federal human rights legislation. It also found that the Board deliberately offered only one year contracts in part to skirt its obligations under the *Act* to employees who become pregnant. The Tribunal ordered the respondent to cease its discriminatory practices against pregnant employees, and to develop a plan to prevent further incidences of pregnancy-based discrimination.

Full text of decision:
http://chrt-tcdp.gc.ca/search/files/t1327_5708chrt34.pdf

Vilven and Kelly v. Air Canada and Air Canada Pilots Association

In Canada, the aging workforce and older population are posing increasingly urgent demographic challenges. In 2009, the Tribunal heard a case that questioned long-held assumptions in Canadian society concerning aging and employment, including the economic organization of the workforce, the dignity of elderly workers, and the reconciliation of collective bargaining rights and equality rights. In the case of *Vilven and Kelly v. Air Canada and Air Canada Pilots Association*, the complainants were airline pilots who challenged the provision of their collective agreement, which provided for mandatory retirement at age 60. The complainants alleged that the provision resulted in age discrimination. The airline and the bargaining agent maintained that the mandatory retirement rule was justifiable under the *CHRA* since the complainants' employment had been terminated because they had reached the "normal age of retirement" for pilots. They also argued that the mandatory retirement was justifiable under the *Act* on the grounds that it constituted a *bona fide* occupational requirement (BFOR).

In this case, the Tribunal needed to determine whether the "normal age of retirement" defense was a justifiable infringement of the equality guarantee in the *Canadian Charter of Rights and Freedoms (Charter)*. It also had to determine whether the respondents could meet their burden of proving the BFOR defense. On the *Charter* issue, the Tribunal concluded that this provision of the *Act* was unconstitutional and refused to apply it to the impugned section of the collective agreement. The Tribunal noted that the objective of the normal age of retirement defense was to allow mandatory retirement to be negotiated in the workplace. On the evidence, however, it could not conclude that this objective was sufficiently pressing and substantial to warrant an infringement of rights.

To determine whether the mandatory retirement provision in the collective agreement constituted a BFOR, the Tribunal had to consider whether the complainants could be allowed to fly past age 60 without causing undue hardship to the respondents. The employer gave several reasons to demonstrate hardship. For example, the airline argued that providing such accommodation would cause it undue hardship since allowing pilots over 60 years of age to fly internationally would violate standards set by the International Civil Aviation Organization (ICAO). The Tribunal found that prior to modification of the ICAO standard in 2006, there was no bar to allowing the complainants to continue to fly internationally in the role of first officer (as opposed to flying as a captain/pilot

in command). The employer did not consider this possibility in regard to the complainants. The Tribunal also rejected the employer's arguments that allowing pilots to fly past age 60 was an undue hardship if it created scheduling conflicts or delayed the promotion of younger pilots. Since the respondent failed to establish a BFOR in regard to the mandatory retirement rule, the Tribunal concluded that the complaint was substantiated, and decided to hear submissions on a remedy.

Full text of decision:
http://chrt-tcdp.gc.ca/search/files/t1176_5806chrt24.pdf

Judicial Review by the Federal Court of Canada

In 2009, the Federal Court issued eight judgments related to Tribunal decisions. Two judgments were rendered by the Federal Court of Appeal. One of the most significant decisions involved the matter of *Vilven and Kelly v. Air Canada and Air Canada Pilots Association.* The Court held that the Tribunal had erred in finding the normal age of retirement defense in the *Canadian Human Rights Act* to be compatible with the equality guarantee in the *Canadian Charter of Rights and Freedoms*. The Court concluded that the normal age of retirement defense resulted in an infringement of equality rights. The Court referred the case back to the Tribunal to determine if this infringement was demonstrably justifiable under the *Charter*.

Of the Court of Appeal judgments, the decision in *Mowat v. Canada (Canadian Forces)* is particularly noteworthy. Since the 1980s, a series of Tribunal decisions espoused the position that in granting compensation under the *Act* for expenses resulting from the discriminatory practice, the Tribunal could order compensation for the victim's legal expenses. Several Federal Court decisions were rendered on this issue, some supporting compensation, others against it. The Tribunal was not unanimous on the subject. In this case, the Federal Court of Appeal has eliminated any uncertainty in the law by holding that compensation for legal expenses cannot be ordered. The Court concluded that the question of costs in human rights adjudication was a policy matter, and that the entity best placed to weigh the policy concerns and make the ultimate decision was Parliament, and not the Tribunal or the Court.

All 2009 judicial review decisions can be found on the websites of the Courts that rendered them.

Judicial review decisions
http://chrt-tcdp.gc.ca/NS/decisions/index-eng.asp

Tribunal Decisions and Membership

The full text of all formal rulings on motions and objections rendered in 2009 can be found on the Tribunal's website.

http://chrt-tcdp.gc.ca/NS/decisions/index-eng.asp

Judicial Review Decisions

FEDERAL COURT

Montreuil v. Canada (Canadian Forces) 2009 FC 22
Montreuil v. Canada (Canadian Forces Grievance Board) 2009 FC 60
Vilven and Kelly v. Air Canada, Air Canada Pilots Association et al. 2009 FC 367
Khiamal v. Greyhound Canada 2009 FC 367
Tahmourpour v. Canada (Royal Canadian Mounted Police) 2009 FC 1009
Tanzos v. AZ Bus Tours Inc. 2009 FC 1134

FEDERAL COURT OF APPEAL

Brown v. Canada (National Capital Commission) 2009 FCA 273
Mowat v. Canada (Canadian Forces) 2009 FCA 309

Members of the Tribunal

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J. Grant Sinclair, Q.C., Chairperson (to November 1, 2009)
Athanasios D. Hadjis, Vice-Chairperson
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